BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DAVID COOK, JR.	)	
Claimant	)	
V.	)	
	)	
THE CAPPER FOUNDATION	)	CS-00-0150-609
Respondent	)	AP-00-0448-040
AND	)	
	)	
ACCIDENT FUND GENERAL INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of Administrative Law Judge Ali Marchant's Award dated November 19, 2019. The Board heard oral argument on June 11, 2020.

APPEARANCES

Randy S. Stalcup appeared for Claimant. Matthew J. Schaefer appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ determined Claimant's average weekly wage (AWW) was $553.33 and found Claimant suffered an 11% wage loss. Finding both medical experts credible, the ALJ concluded Claimant sustained a 17% whole body functional impairment and 53.5% task loss. The ALJ awarded Claimant a 32.25% work disability and future medical treatment upon proper application.

Respondent argues Claimant is not entitled to a work disability and should be limited to a whole body functional impairment between 15% and 17%. Respondent contends the ALJ erred in calculating Claimant's post-injury average weekly wage and argues Claimant is earning or capable of earning a comparable wage. In the alternative, Respondent asserts Claimant has no more than a 24% work disability. Respondent further argues the greater weight of credible evidence shows Claimant will not require future medical treatment.

Claimant maintains the Award should be affirmed, with the exception of the ALJ's determination of his average weekly wage. Claimant argues his average weekly wage should be $554.85.

The issues on appeal are:

1. What is Claimant's average weekly wage?

2. What is the nature and extent of Claimant's disability? This includes Claimant's post-injury average weekly wage and whether Claimant is entitled to a work disability.

3. Is Claimant entitled to future medical?

FINDINGS OF FACT

Respondent operates seven different houses where individuals with various levels of disabilities reside. Claimant began working for Respondent approximately five years ago as Direct Support Staff. After a year, he was promoted to Direct Support Staff 2. Claimant's job duties included supervising other staff, going into houses, helping clean houses and taking care of clients. Client care included changing them, passing their medications and making sure their daily needs were met.

On April 27, 2017, Claimant assisted a coworker with moving a client, weighing between 150 and 200 pounds, from her wheelchair to the bed. The client stiffened up during the transfer, causing Claimant to support her full weight. About an hour later, he noticed pain in his low back. He reported the accident to his supervisor, and was referred for authorized medical treatment. On October 3, 2017, Claimant underwent an L4-S1 lumbar spine fusion by Dr. Theo Mellion. On May 3, 2018, Claimant reported some residual pain on his right side, but overall his symptoms were significantly improved. Dr. Mellion placed him at maximum medical improvement (MMI).

At Respondent's request, Claimant saw John Estivo, D.O., on June 26, 2018, for an independent medical evaluation (IME). Dr. Estivo reviewed medical records and performed a physical examination. He took x-rays of the lumbar spine, which revealed a solid fusion with no instability. He diagnosed Claimant with status post L4-S1 fusion. He opined Claimant has a 15% permanent partial impairment under the AMA *Guides to the Evaluation of Permanent Impairment,* Sixth Edition (hereinafter the *Guides*). He placed permanent restrictions on Claimant's activities. Dr. Estivo opined Claimant does not require any further medical treatment other than over-the-counter pain medications as needed.

At his attorney's request, Claimant saw Daniel Zimmerman, M.D., on August 13, 2018. Dr. Zimmerman reviewed medical records and performed a physical examination. He opined Claimant has a 19% permanent partial impairment under the *Guides*. He placed

permanent restrictions on Claimant's activities. Dr. Zimmerman concluded Claimant will more likely than not require additional medical treatment, including medications, injections and possible pain management interventions.

At his attorney's request, Paul Hardin, a vocational consultant, interviewed Claimant by phone on October 8, 2018. He prepared a list of 29 non-duplicative tasks Claimant performed for the five years preceding his accident. Of the 29 tasks on Mr. Hardin's task list, Dr. Zimmerman opined Claimant was unable to perform 21 of them for a 72% task loss. Dr. Estivo opined Claimant was unable to perform 12 of the tasks for a 41% task loss.

At Respondent's request, Steve Benjamin, a vocational rehabilitation counselor, interviewed Claimant in person on March 6, 2019. He prepared a list of 34 non-duplicative tasks for the five years preceding Claimant's accident. Of the 34 tasks on Mr. Benjamin's task list, Dr. Estivo opined Claimant was unable to perform 12 of them for a 35% task loss.

Claimant continues to work for Respondent, essentially performing the same job tasks. The main difference in his job requirements is he is now limited to high-functioning clients. He generally works at least 40 hours per week with some overtime. Like before his accidental injury, Claimant is offered overtime work, which he is free to accept or decline.

Deena Baker is the residential/day service manager for Respondent and Claimant's supervisor. Ms. Baker testified Claimant earned $10.81 per hour until March 24, 2019, when his hourly rate was increased to $11.03. Ms. Baker confirmed employees are not required to accept overtime hours and are not required to explain why they are declining the overtime offer. She began tracking overtime hours offered to Claimant in February 2019.[1] There have been opportunities every week for Claimant to work overtime in a house where clients are very independent.

ANALYSIS & CONCLUSIONS OF LAW

1. Claimant's average weekly wage is $553.33.

K.S.A. 44-511(b)(1) sets forth the relevant AWW calculation: "the wages the employee earned during the calendar weeks employed by the employer, up to 26 calendar weeks immediately preceding the date of the injury, divided by the number of calendar weeks the employee actually worked, or by 26 as the case may be."

[1] Baker Depo., Ex. 3.

Based on *Martin,*[2] Claimant asks the Board to add a partial week calculation to the AWW having the effect of increasing Claimant's AWW to $554.85. The Board disagrees. Claimant's reliance on *Martin* is misguided. *Martin* clearly sets forth partial weeks included within the "26 calendar weeks immediately preceding the date of the injury" shall be excluded in calculating an injured worker's AWW. The ALJ correctly excluded two weeks during which Claimant did not work and the partial week during the week of his accidental injury.

2. Claimant is awarded a 32.25% work disability.

K.S.A. 44-510e(a)(2)(B) states:

> The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based...on the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

Two physicians provided their opinions regarding Claimant's functional impairment based on the *Guides*. Dr. Zimmerman, on behalf of Claimant, opined he has a 19% impairment to the body as a whole. Dr. Estivo, on behalf of Respondent, opined he has a 15% impairment to the body as a whole. The ALJ found both opinions to be credible, supported by the evidence and gave them equal weight. Claimant was awarded a 17% permanent partial functional impairment to the body as a whole. The Board agrees with the ALJ's analysis and conclusion.

K.S.A. 44-510e provides, in part:

> (a)(2)(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
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> (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and
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> (ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

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[2] *Martin v. Royal Valley Public Schools USD 337*, No. 1,060,837, 2013 WL 4051827 (Kan. WCAB July 1, 2013).

> In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.
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> (D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.
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> (E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.
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> . . .
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> (iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

Claimant's 17% to the body as a whole impairment rating exceeds the functional impairment threshold necessary to qualify him for a work disability. The main issue is whether Claimant's post-injury wage loss is greater than 10%, thus entitling him to work disability compensation in excess of the functional impairment. The ALJ found Claimant had an 11% wage loss and awarded work disability compensation. The Board agrees with the ALJ's analysis and conclusion. In calculating post-injury earnings, the Board favors an "apples to apples" approach over lengthy time periods of earnings. The Supreme Court in

Graham stated cherry-picking weeks to arrive at a pre-determined conclusion should be avoided.[3]

The ALJ calculated Claimant's post-injury wages by taking Claimant's total earnings from the date of accident ($43,366.09) and dividing the sum by the number of weeks worked since the date of accident after deducting the weeks of TTD paid (106 -18 = 88). The ALJ found Claimant has an 11% wage loss. The Board agrees with the ALJ's wage loss. At oral argument, the date Claimant was found to be at MMI (5/3/18) was discussed as a starting point for post-injury wage calculations. Interestingly, if the date of MMI was used to start post-injury wages calculations, Claimant also has an 11% wage loss.

Respondent asks the Board to calculate Claimant's post-injury earnings beginning with the date his functional impairment compensation pays out, citing *Wheeler*.[4] Respondent's reliance on *Wheeler* is misplaced. *Wheeler* dealt with a request for review and modification of an award. Here, we are required to calculate post-injury earnings to determine Claimant's eligibility for work disability. The goal is to find a time frame most accurately reflecting Claimant's post-injury earnings. Accepting Respondent's argument limits the examination of Claimant's post-injury earnings to twenty weeks and establishes a date to begin calculations that may or may not accurately reflect Claimant's post-injury earnings. Post-injury earnings are not altered or affected by the fact Claimant is also receiving permanent partial disability compensation. His post-injury earnings are what they are.

Respondent also argues work disability should be denied because Claimant is capable of earning comparable wages, as defined by K.S.A. 44-510e(a)(2)(E):

> "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

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[3] *Banuelos v. Eurest*, No.1,048,817, 2016 WL 4607974, at 10 (Kan. WCAB Aug. 16, 2016) (*citing Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007)).

[4] *Wheeler v. Boeing Co.,* 25 Kan. App. 2d 632, 967 P.2d 1085 (1998).

Specifically, Respondent argues Claimant could be earning comparable wages had he not declined the offer of post-injury overtime hours. The undisputed evidence reveals both before and after Claimant's accidental injury, he was free to accept or decline the offer of overtime hours. Respondent asks us to alter the policy between the parties by requiring Claimant to accept any overtime hours offered. The statute does not require this and the Board will not impose that requirement on Claimant. It is clear from the evidence Claimant was free to select the overtime hours he wanted to work. There is no evidence Claimant was trying to manipulate his post-injury earnings to qualify for work disability benefits.

Based upon Paul Hardin's task loss assessment, Dr. Zimmerman opined Claimant has a 72% task loss. Dr. Estivo, utilizing Steve Benjamin's report, opined Claimant has a 35% task loss. Both experts are well known to the ALJ and the Board. The ALJ found "the opinions of Dr. Zimmerman and Dr. Estivo regarding Claimant's task loss to be equally credible and supported by the evidence and thus afford them equal weight."[5] The Board agrees. The ALJ averaged the two task loss opinions resulting in a 53.5% task loss and averaged the task loss with the 11% wage loss resulting in a 32.25% work disability.

3. Claimant is awarded future medical benefits.

K.S.A. 44-510h presumes an employer's obligation to provide medical benefits terminates when the employee reaches MMI. The presumption may be overcome with medical evidence it is more probably true than not additional medical treatment will be necessary after such time as the employee reaches MMI.

The ALJ stated: "Given the extent of Claimant's significant spinal surgery and Dr. Zimmerman's opinions, the Court finds that Claimant has met his burden to prove that it is more probable than not that he will require future medical treatment related to his injuries."[6] The Board agrees. Dr. Estivo's opinion Claimant "does not require any further medical treatment in relation to the injury"[7] is simply not credible in light of Claimant's two-level fusion.

AWARD

WHEREFORE, the Board affirms the November 19, 2019 Award.

IT IS SO ORDERED.

Dated this _____ day of July, 2020.

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[5] ALJ Award at 9.

[6] *Id*. at 10.

[7] Estivo Depo., Ex. 2 at 3.

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BOARD MEMBER

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BOARD MEMBER

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Electronic copies via OSCAR to:
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